SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 09/4432

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

26/02/2014
DATE SIGNATURE

In the matter between:

GODFREY MATHEBULA Plaintiff

and

SOUTH AFRICA RAIL COMMUTER CORPORATION LTD First Defendant

METRORAIL Second Defendant

J U D G M E N T

MASHILE, J:

[1] The Plaintiff, a 20 year old young man at the time of the accident, instituted an action for damages against the Defendants jointly and severally

the one paying the other to be absolved for personal injuries sustained in a train accident on 27 September 2007. It is common cause that the circumstances under which the accident occurred render the Defendants liable to compensate the Plaintiff for the resultant injuries.

[2] The case serves before this court with the question of liability having been resolved 60% / 40% in favour of the Plaintiff. The Defendant will thus be liable for the proven damages of the Plaintiff to the extent of 60% only.

[3] The parties are agreed that in consequence of the accident the Plaintiff suffered a severe degloving of his left arm resulting in a below elbow amputation and a head injury. The parties have in addition managed to settle some facets of quantum and these are:

3.1 General damages;

3.2 Past loss of earnings; and

3.3 Future loss of earnings.

[4] All the above were settled for a total amount of R650 000.00 and over and above the aforegoing, the parties also successfully settled some features of future medical expenses such as, costs of orthopaedic treatment and occupational therapy. The total amount of the settlement for the two headings amounted in all to R39 648.00.

[5] The following are common cause between the parties:

5.1 The Plaintiff is a suitable candidate for a below elbow prosthesis arm;

5.2 The plaintiff requires some sort of domestic assistance;

5.3 Save for the cost of the prosthesis, the defendants have by and large admitted the medico-legal report of the plaintiff's orthopaedic surgeon, Professor J Flemming, in most respects;

5.4 The Plaintiff would have continued to work as a hawker until retirement age had the accident not taken place;

5.5 Now that the accident has occurred, the Plaintiff is totally unemployable and has no residual earning capacity.

[6] The following remain in dispute:

6.1 The type of prosthesis arm to be provided to the Plaintiff;

6.2 How much the domestic assistant should be paid.

[7] Accordingly, the issues that this court is asked to decide are:

7.1 Is the Plaintiff to be awarded an amount for the acquisition of an electric or a mechanical prosthesis?

7.2 The type and cost of the domestic assistance that should be supplied to the Plaintiff.

[8] The Plaintiff has ardently argued that he is, in all respects, an eligible candidate for a prosthesis that is electrically powered. Needless to state that the Defendants have, with the same amount of passion, contended that a mechanical prosthesis would be ideal given the conditions under which the Plaintiff lives. Both Counsel have referred this court to a plethora of literature on the subject and so have their respective witnesses.

[9] In support of the Plaintiff's case the following expert witnesses were called:

9.1 Mr Grimsehl, an orthotist;

9.2 Ms Nape, an occupational therapist.

[10] The need to call Mr Malaka and Professor Flemming, the industrial psychologist and the orthopaedic surgeon respectively, was obviated as their reports were admitted.

[11] The Defendants called the following expert witnesses to testify in support of the Defendants' case:

11.1 Mr Fourie, an orthotist;

11.2 Ms Swart, an occupational therapist.

[12] The Defendants also called Mr De la Rey who is a double amputee to assist the court with a factual account of a person who utilises both forms of prosthesis. Although the orthotists and the occupational therapists had prepared joint minutes, they still took the stand as their minutes were not congruent in all respects.

[13] The Plaintiff took the stand and stated:

13.1 He is from Limpopo Province and he lives in Makititi, which is approximately 15 to 20 kilometers from Malumulele, one of the major towns in the area but smaller than Giyani;

13.2 He does not have a property of his own, lives with his wife and two children in one of four huts on a property belonging to his parents. His unit is built with mud and, like most dwelling units in the area, has a thatched roof;

13.3 The hut would at times succumb to strong winds and collapse. Makititi is one of the villages in the area that still depends on gravel roads;

13.4 He walks for approximately 7 minutes to fetch water from a communal tap as the properties in the village have not yet been provided with individual water taps;

13.5 The four huts on the property are serviced by one pit toilet. His hut has a pre-paid electricity meter;

13.6 Electricity for a rural family such as that of the Plaintiff can be somewhat prohibitive. Thus, he finds that there always exists a need to cut wood to make fire for their energy requirements;

13.7 He wants to make Makatiti his permanent future home. When he is in Gauteng he stays in Tembisa with his brother in a shack. He is otherwise in Makititi.

13.8 The plaintiff's arm is amputated approximately 15 centimeters below the elbow. In consequence of this amputation the plaintiff has been left permanently disabled such that he is unable to:

13.8.1 Work;

13.8.2 Fetch water for his household;

13.8.3 Plant or work in the garden;

13.8.4 Cut wood to supplement electricity or to utilise it as an alternative energy;

13.8.5 Bath himself, but his wife assists him if present otherwise he requests neighbours to help;

13.8.6 Put on trousers, zip up and tie his shoelaces.

13.9 The shack in which he stays with his brother whenever he is in Gauteng does not have water and electricity.

13.10 He was not aware of how much money his attorneys have claimed on his behalf for his injuries.

13.11 Although he does not know how much the proceeds of his claim will be, he nonetheless intends to use them to build a house and a borehole in Makititi;

13.12 He will further employ the funds to maintain and see to his children's further studies;

13.13 Maintain his living standards;

13.14 Buy a plot and build a house in Johannesburg.

[14] His cross-examination did not yield anything of significance. He intends to purchase land in Gauteng to build a house and another in his village with a borehole but he neither knew the costs of acquisition, construction of the properties nor the sinking of the borehole.

[15] Mr Grimsehl testified as follows:

15.1 After testing and assessing the Plaintiff, he found that he was suitable for an electric prosthesis;

15.2 The user of an electric prosthesis would employ the exact same muscles that he used for his normal arm to activate the hand. The hand would then open and close almost in the same manner as the user did previously with his ordinary muscles;

15.3 He compared the two types of prosthesis and in consequence of the numerous advantages in the electric prosthesis felt compelled to recommend it for the Plaintiff;

15.4 The mechanical prosthesis has a harness that runs around the arm. One would then pull the harness on the opposite shoulder

every time one wants to open one's hand. The opening of the hand is controlled by a movement of one's shoulder blades, which would pull the cable behind one's back that runs around to oneself's terminal device on the prosthetic side;

15.5 The electric prosthesis simplifies matters as one would simply put it on and open and close it in the manner one used to with one's ordinary hand. One can open and close the prosthesis at will;

15.6 Although a mechanical prosthesis costs less and requires less maintenance, it needs more effort to use;

15.7 It is difficult to pick up an item whether on the ground or table;

15.8 The extent to which a mechanical prosthesis opens is only 5 to 6 centimetres;

15.9 It is limited in movement in instances where one wants to pick something up from the floor or wants to reach something behind one's head;

15.10 An electric prosthesis operates closer to the natural arm in that it has a full grip pattern, full force in opening and closing of the

hand;

15.11 The electric prosthesis has two mayo electrodes, one connects on the inside muscle and the other fits on the outside muscle of the arm. This allows movement to be as natural as possible;

15.12 These days the advancement of technology has made it possible for the electric prosthesis hand to open at least up to 300 millimetres;

15.13 The hand can open and close so fast that one is able to catch a Frisbee;

15.14 The following advantages of the electric prosthesis were a common cause between the parties:

15.14.1 The user can determine the exact pinch force and speed for any task, regardless of the position of the arm;

15.14.2 It has the benefit of both voluntary opening and closing, whereas the body powered prosthesis can only open;

15.14.3 It can attain a hard or light grip without significant effort;

15.14.4 The hand can be interchanged with a Greifer terminal device for heavy work. The hand can be turned one and a half times, it clicks loose from the arm and attaches another device which looks like big pliers. The device is designed to be used for heavy work;

15.14.5 It allows the amputee more function when the elbow is flexed;

15.15 The mechanical prosthesis does not allow full opening of the terminal device. The pull of the cable creates auxiliary forces in the contra lateral arm. It hurts when pulled all day long;

15.16 The electric prosthesis is designed to resist salt water and sweat. It has a sealing ring on the top inside of which are the electronics;

15.17 The electric prosthesis has a PVC glove which seals everything inside and nothing is exposed to the weather. It is water resistant. However, it can become affected and defective if it is submerged in water;

15.18 The Plaintiff could be supplied with two to three spare batteries to overcome electricity challenges in the rural village of Makititi;

15.19 He recommended two electric prosthesis to be replaced every five years so that if the one encountered a problem, the amputee could use the other.

[16] In cross-examination Mr Grimsehl was persistent that the Plaintiff was well suited for the electric prosthesis for the environment within which he lived notwithstanding.

[17] His argument was that the prosthesis was made in such a manner to take into consideration that it could be exposed to dust, sweat and water. Over and above the aforegoing, the amputee needs to be fully trained and edified on what the prosthesis can or cannot do.

[18] Mr Grimsehl was also adamant that an electric prosthesis was, over and above being the easier to use, cosmetically more acceptable.

[19] He did not believe that Professor Flemming could, without consulting with an orthotist such as himself, simply prescribe or recommend a type of prosthesis that could be suitable to the Plaintiff.

[20] Normally such a prescription is the result of a joint consultation of a multi disciplinary team of experts such as an orthotist, orthopaedic surgeon,

an occupational therapist, a physio therapist and a clinical psychologist. There is no question that the different experts did not consult for purposes of deciding which of the two prosthesis would be the most appropriate for the Plaintiff.

[21] He further stated that the leading party in the multi disciplinary team is an orthotist. Thus an orthopaedic surgeon would check whether or not the stub is orthopaedically suited to be fitted with a prosthesis, an occupational therapist would assess the amputee's functionality with the prescribed prosthesis within a given environment, a psychologist would look at the psychological impact of the utilisation of a particular prosthesis within a given situation and a physiotherapist would train the muscles that the amputee will engage when using the prosthesis. All the contributions would then be considered and the orthotist will get to design the recommended prosthesis.

[22] Ms Nape, the occupational therapist testified that:

22.1 She is a holder of a bachelor's degree in occupational therapy from the Medical University of South Africa (MEDUNSA) now called University of Limpopo, Medunsa campus;

22.2 She has been practicing as such since 1996 to date. Her qualifications were not challenged by the Defendant. She

assessed the Plaintiff and produced a report subsequent to which she also co-authored a joint minute with Ms Swart, the other occupational therapist who gave evidence on behalf of the Defendant;

22.3 The joint minute that she and Ms Swart prepared states that they agree that Mr Mathebula will continue to be without an arm for the rest of his life and remain markedly disabled despite the recommended prosthesis and rehabilitation. He will remain permanently incapable of having physical chores and those requiring fine manual dexterity;

22.4 She noted in the joint minute that the Plaintiff will always require practical assistance and she recommends a domestic assistance of two hours per day, seven days per week;

22.5 In the event that the Plaintiff happens to live alone the assistance will be required on a full-time basis, seven days a week and overtime rates will apply over weekends;

22.6 She states further that the Plaintiff will benefit from a gardener, handyman on two half days per month. The prevailing rates for this area should also be used for costing purposes;

22.7 The Plaintiff will need this assistance for as long as he lives. She was not aware of the rates for domestic workers and

gardener and/or handymen in Makititi. She noted however that the applicable rates in the area of Johannesburg are R120.00 and R100 to R110.00 for domestic employees and gardeners and/or handymen respectively;

22.8 She testified that Ms Swart believes that the Plaintiff will only need assistance for 10 hours per annum on heavy duty work. The assistance that he needs will be required regardless of the type of prosthesis to be eventually prescribed for him;

22.9 The joint minute notes further that taking into consideration the Plaintiff's previous employment, his life roles, living conditions and social circumstances she and Ms Swart agree with Professor Fleming's recommendations that Mr Mathebula would be best suited to a body-powered prosthesis. However, both of them deferred to the orthotist for further specifications in this regard;

22.10 She and Ms Swart simply agreed with Professor Flemming's recommendation without delving into the particulars. It was for that reason that they then deferred to someone whom they thought would be well disposed to finalise on the specifications as outlined by Professor Flemming;

22.11 The two occupational therapist assumed after conducting research on the internet that what Professor Flemming

described in his medico-legal report was a body powered prosthesis;

22.12 Under cross-examination she stated that she thought a body powered prosthesis came close to what Professor Flemming described but thought it wise to rather defer to an expert in the area of prosthesis – an orthotist;

22.13 She stated in her report that a body-powered prosthesis would be the most suitable regard being had to the Plaintiff's previous employment, his life roles, living conditions, and social circumstances;

22.14 She explained further that the purpose of deferring to the relevant expert was to obtain details of the type of prosthesis that Professor Flemming had prescribed even though they thought it fitted the description of a body powered prosthesis;

22.15 She was not clear on why she said in her report that given the previous employment, life roles, living conditions, and social circumstances a body powered prosthesis was the most appropriate;

22.16 She stated that after listening to what Mr Grimsehl and the Plaintiff had to say during their testimony in court, she was

convinced that the Plaintiff would benefit more from an electric prosthesis. The Plaintiff would stand to injure certain parts of his upper body with the movements and postures that he would be required to take when using a mechanical prosthesis;

22.17 It was put to her that prior to compiling her report or even signing the joint minute with Ms Swart, she had an opportunity to peruse the report of Mr Grimsehl. His recommendation was obviously an electric prosthesis yet she did not see it fit to go along with him in her report;

22.18 It was rather strange that she was singing a different tune when she was in court. Her answer in this regard was that she had reconsidered her position especially after hearing how uncomfortable a body powered prosthesis is likely to be. The testimony of Ms Nape brought the case of the Plaintiff to an end.

[23] Testifying on behalf of the Defendant, Mr De la Rey took the stand and said:

23.1 He is a 63 year old double amputee who sustained injuries to his right and left arms in a landmine accident in 1981. His right arm is amputated halfway between the wrist and the elbow and his left arm is amputated just above the elbow;

23.2 He uses an electric prosthesis on his right arm and a mechanical one on the left arm. He has been using the electric prosthesis for 25 to 30 years and has been using the mechanical prosthesis slightly longer than the electric one;

23.3 He works as an administrator at the Department of Defence. His work entails office work, interviews, and interactions with people, negotiations and attending meetings;

23.4 He uses the electric prosthesis mainly for his office work as he finds it easier to work with paper and for writing;

23.5 He utilises the mechanical prosthesis for more difficult and hard work such as cutting lawn, digging and painting albeit that he would not use either of the prosthesis for digging if he had a choice. He prefers using the mechanical prosthesis for this type of work because it is relatively more robust of the two;

23.6 Moreover, the mechanical prosthesis is not sensitive to dust and water. For that reason, the mechanical prosthesis comes as a natural choice under those circumstances. According to him the electric prosthesis is not conducive to work involving the exertion of pressure as the arm will wear out;

23.7 One of his electric prosthesis was damaged only after 7 months of utilisation. The wrist portion of the prosthesis wore out due to the friction resulting from the pressure that he applied during the control of the vehicle when driving;

23.8 He testified that for one to ensure that an item is firmly in one's electric prosthesis hand, one would usually switch it off so that it locks. If that does not happen one may lose a grip of the item as one will not feel it slipping away. This is so because the electric prosthesis does not have nerves to detect movement of the item;

23.9 In consequence of the above he find himself obliged to switch it off and on from time to time to avoid items dropping from his electric prosthesis. Conversely, the experience is not the same with the mechanical prosthesis as once one has shrugged one's shoulder for the prosthesis to open, then the item will be firmly in the grip of the prosthesis after the relaxation of the shoulder;

23.10 It is not advisable for one to carry a 15 or 20 litre bucket of water with an electric prosthesis because doing so will lead to wear and tear of the prosthesis as in the case of driving;

23.11 The electric prosthesis may completely slip out of the socket attached to the residual limb as a result of the weight. He estimated that the maximum that he would carry with an electric prosthesis is approximately 5kg;

23.12 The mechanical prosthesis works differently to the electric prosthesis in that one will be able to carry it with one's body due to the cable that runs over one's shoulders. If one uses the special hook referred to earlier then one should be able to push a heavy wheelbarrow;

23.13 When he went to a dusty area such as Namibia, which he once visited, he preferred the mechanical prosthesis to the electric prosthesis because of its robustness;

23.14 In fact, he stated that whenever he was far from technical support especially in remote areas where the environment was somewhat hostile to the electric prosthesis he preferred the mechanical prosthesis;

23.15 In those instances where one retains one's natural arm such as the present, one would instinctively tend to engage the 'normal arm' to pick up items even though one can do it using the prosthesis, electric or mechanical;

23.16 He prefers to stay without prosthesis whenever he is off duty especially when he is at home. He finds it more comfortable and functional with daily living activities with it off;

23.17 He wears a prosthesis for about 2 to 3 hours on weekends and when he goes to movies especially in those instances when he does not have to drive he would prefer not to wear any prosthesis at all;

23.18 He has learnt to execute certain tasks at home without the aid of prosthesis. These duties include, amongst others, bathing and eating. He remains unable to tie his shoelaces or to close his buttons or cut his food even with an electric prosthesis;

23.19 While he acknowledges that the training of an amputee can and often plays a significant role, it is only through life experience that one gets to know the prosthesis better;

23.20 He was hesitant that one would be able to chop would with either prosthesis. As a double amputee, he would use the electric prosthesis to pick up a glass or a paper or a book. However, if the duty involved harder work, he would prefer the mechanical prosthesis;

23.21 He said that the hand of the mechanical prosthesis would probably get damaged if it were to carry a 15 to 20 liter bucket of water. A hook which attaches to the prosthesis would be the more appropriate device to use if one were to carry such weight;

23.22 The choice of the prosthesis depends on the circumstances for its use;

23.23 Other than stating that the electric prosthesis is sensitive to dust and water, Mr De la Rey said nothing about the design thereof. He was not led or cross-examined on the value of the ring that is installed at the top to seal-off water thereby protecting the electrical components from exposure to water and sweat. He was also not led or asked about the PVC glove that is meant to protect the electric prosthesis from dust;

23.24 One gets the impression that he could have been talking about his own electric prosthesis whose age the court does not know. Counsel for the Defendant did however argue that from Mr De la Rey's account it appears that he was talking about the most recent prosthesis. Unfortunately this submission is not supported by the evidence that was led.

[24] Mrs Swart, one of the occupational therapists, also testifying on behalf

of the Defendant stated that:

24.1 She is a holder of a Bachelor of Science and a Masters Degrees in Occupational Therapy and a post-graduate diploma in vocational rehabilitation. Her qualification and expertise were not challenged by the Plaintiff;

24.2 She and Ms Nape prepared a joint minute wherein they agreed that Mr Mathebula requires a comprehensive, integrated multi disciplinary rehabilitation intervention involving an orthopaedic surgeon, a physiotherapist, an occupational therapist, a medical prosthesist and a clinical psychologist;

24.3 Explaining why a multi disciplinary team approach was vital for the Plaintiff she stated that in any severe disability the best form of rehabilitation is always multi disciplinary;

24.4 The Plaintiff would have been seen by an orthopaedic surgeon who would have been tasked to make a decision on where that arm must be amputated. The orthopaedic surgeon, however, cannot make that decision without knowledge of prosthetics as he may amputate at a place where it makes it not feasible for the amputee to have a prosthesis fitted at all;

24.5 A physiotherapist would then intervene thereafter to rehabilitate the Plaintiff in terms of increasing muscle strength. For example, if the Plaintiff will be using the mechanical prosthesis, he will need to have his upper limp muscle functions improved;

24.6 If the Plaintiff will be using the electric prosthesis, one will be obliged to make sure that the relevant muscles are optimally exercised. A physiotherapist must therefore have knowledge and make a contribution on the type of prosthesis to be prescribed;

24.7 She, as the occupational therapists comes in as the functional expert. Her task is to get the Plaintiff back into society. In other words, one will examine the Plaintiff, checking his environmental background, what his life roles were and return him to those life roles as best as possible;

24.8 An occupational therapist would achieve this by making home and work visits. The decision of what prosthesis the Plaintiff will eventually be using should be informed by what the Plaintiff is doing in life;

24.9 The clinical psychologist deals with the emotional aspects of

how the injury and this body deformity are affecting the amputee. These experts would then meet with the orthotist who is the expert on what is available and what the latest is;

24.10 Ideally, the multi disciplinary team needs to consult and together select what would be the best prosthesis for a specific individual. There is no one-size-fits-all option;

24.11 Both she and Ms Nape agreed that the focus of Mr Mathebula's rehabilitation program would be to select a suitable prosthesis for his left arm and to train him in the use of this prosthesis to optimise his function in his various life roles;

24.12 Both occupational therapists also agreed that taking into consideration Mr Mathebula's previous employment, his life roles, living conditions and social circumstances, Prof Fleming's recommendations that Mr Mathebula would be best suited to a body-powered prosthesis be accepted. They defer to the medical prosthesist for further specifications in this regard;

24.13 She said that both she and Ms Nape agreed that Professor Flemming described a mechanical prosthesis and that their decision to accept his recommendation was preceded by an assessment of the Plaintiff's background. In her investigations, she found the Plaintiff to be a fairly unsophisticated person;

24.14 Both occupational therapists in their separate investigations found that the Plaintiff had worked as a street vender for the years that he had been employed but even then both she and Ms Nape have very conflicting histories as to what he actually did as a street vender;

24.15 They, however, accepted that he has earned money through being a street vendor and that he lived in a rather rural area. He resided in a squatter camp set-up whenever he was in Gauteng where he actually worked. He had no other work experience and possessed a Grade 8 or 10 education;

24.16 She understood her role in this whole process as being to return him to those functions. She stated that with the basic knowledge that she and Ms Nape had to apply on prosthetic fittings, they felt that the mechanical prosthesis would be the best to give a person such as the Plaintiff to carry on with his roles of self-maintenance, caring for himself, living in a fairly, or a pretty unsophisticated environment and working, if he could, as a street vendor;

24.17 Ms Nape does not express an opinion in her report on the type of prosthesis that should be prescribed for the Plaintiff. However, after Ms Swart had advised Ms Nape that they needed to advise the team on the functionality part of the type of

prosthesis, they discussed the subject and concluded that the mechanical prosthesis would be appropriate in the circumstances of the Plaintiff;

24.18 She is generally familiar with the broad categories of prosthesis but she is oblivious of trade names and what is available and what the latest is. It remains part of her role as an occupational therapist to be aware of the broad categories and be able to advise what could be appropriate taking into account functionality;

24.19 Prior to compiling her report she had the Thembisa Hospital records and the medico-legal reports of Professor Flemming, Mr Grimsehl, Ms Nape and Dr Jackson and Dr Malaka, the industrial psychologists. She did not have the advantage of the report of the Defendant's orthotist, Mr Fourie, but still came to the conclusion that the mechanical prosthesis would be the most suitable for the Plaintiff;

24.20 Her expertise is essentially in work rehabilitation. She stated that she often finds that rejection of a prosthesis is ubiquitous in upper body limb amputees. She added that this is common in instances where the had been a lapse between the amputation and the rehabilitation more particularly, in single amputees;

24.21 Some of the reasons for the rejection of the electric prosthesis are that it is heavy. It feels as though it is hanging at the end of the arm. A number of her customers with whom she had worked especially those who are somewhat uncomfortable with technology seem to prefer the mechanical prosthesis that is strapped to the arm;

24.22 The second reason, which she claims constituted one of her main consideration, why she recommended a mechanical prosthesis is the home environment of the Plaintiff. The Plaintiff lives in a hut built of mud bricks with a thatched roof and unreliable pre-paid electricity metre;

24.23 She is aware that these mud huts are often not the cleanest environments. Dust would therefore certainly be a challenge for the electric prosthesis and maintenance will be costly;

24.24 She had some misgivings on whether or not there would be a service centre in the Makititi area to keep the prosthesis in best working condition. She expressed doubt on the Plaintiff's means to service the prosthesis given his poor financial background. This may result in the Plaintiff eventually rejecting the prosthesis;

24.25 Professor Flemming writes in his report that the patient has never been offered a prosthesis and once his stump is free of pain he should be prepared for a below elbow prosthesis. This will consist of a cup that attaches to the forearm and two terminal devices, one being a hook and the other one being a cosmetic hand the total costs for this would be R75 000.00 and it is reasonable to have a running repair costs of R10 000.00 a year, and after a period of six to ten years this should be replaced;

24.26 She said that she was persuaded that the description fitted that of the mechanical prosthesis besides, the price and the cost of maintenance were low. She said that price of electric prosthesis would have been far higher and the cost of maintenance would have been more prohibitive;

24.27 The deferment to an orthotist was merely for him to state the specifics of the mechanical prosthesis and not the type of prosthesis that was to be prescribed for the Plaintiff. She says she has always been very lucid on what she was recommending to the Plaintiff;

24.28 She recommended far fewer hours per year to those of her counterpart because she found the Plaintiff to be independent on a number of aspects of his daily life. These include among others, eating, dressing and undressing, teeth brushing, hair management, toilet, bathing and showering, writing, and making telephone calls;

24.29 In cross-examination, Ms Swart essentially stuck to what she said in her examination-in-chief. Regarding level of comfort of the electric prosthesis, she stated that both have a certain degree of discomfort but it will depend on one's personal choice;

24.30 It was plain that Ms Swart had made up her mind that the mechanical prosthesis is the most appropriate for the Plaintiff and was therefore not prepared to concede an inch at any stage. This approach is also true of Ms Nape who steadfastly supported the prescription of an electric prosthesis;

24.31 There is a broad variety of prosthesis meant for different situations. They could be customised for a particular function such as holding a golf stick, etc. In terms of the design and types, an occupational therapist is not an expert, an orthotist would be the one that can advise.

[25] Mr Fourie is an orthotist and was the last witness to give evidence on behalf of the Defendant. He said:

25.1 He has a national diploma in national medical prosthetics, which he completed in 1997. Thereafter he furthered his studies until he obtained his B-Tech degree in medical prosthetics. He has been practicing as an orthotist for approximately 18 years and his practice is in Centurion;

25.2 Mr Fourie strongly recommended a mechanical prosthesis for the Plaintiff. His rationale for doing so is that if one evaluates an amputee, one has to consider a number of things, among which are that, an amputee is never separate from his environment. He is always either at home or work or somewhere. That is part of the reasoning that an orthotist has to take into consideration when one is to prescribe a prosthetic device;

25.3 His evidence was not radically different from the Plaintiff's orthotist, Mr Grimsehl, except that he was persistent that environment was contra-indicated for an electric prosthesis. He conceded that the electric prosthesis looked and operated more like a natural hand;

25.4 He also conceded under cross-examination that at the time when he compiled his report in January 2013, he could not have prescribed an electric prosthesis as he lacked the qualification. However, this did not mean that he did not possess knowledge of how such prosthesis works. With the conclusion of Mr Fourie's evidence, the Defendants closed their case.

[26] It is significant to point out from the onset that it is philosophical whether or not this court awards the Plaintiff an amount for the electric or the mechanical prosthesis. The justification for that statement is that whichever approach the court takes the Plaintiff will not be able to purchase the prosthesis, electric or mechanical. This is because the parties have already agreed that the award is to be subject to a 40% contributory negligence.

[27] With that prelude I turn to the analysis of the evidence of the witnesses. The Plaintiff was ignorant of the amount of damages his attorneys have claimed. It should be safe to surmise that he was also not aware of the differences and benefits that he will derive from the prescription of the one prosthesis or the other.

[28] The Plaintiff, to the extent possible, wants to be restored to his pre-accident position. He was a street vendor, could do gardening, chop wood for his family energy requirements and executed all his other personal roles in and outside his home. His dominant hand, the left, has been amputated. It has been almost six years that he has been without it.

[29] The Plaintiff argues that the electric prosthesis, unlike the mechanical prosthesis, would bring him closer to how he looked, felt and carried out his duties prior to the accident. Mr Grimsehl testified that the electric prosthesis with one or two disadvantages regard being had to the environment within which the Plaintiff will live his life, the electric prosthesis is the most suitable to be prescribed.

[30] Directly opposed to this view is Ms Swart and Mr Fourie, both of whom testified on behalf of the Defendants. The argument advanced on behalf of the Defendants is that the Plaintiff is unsophisticated, lives in a hut built of mud bricks with a thatch roof that possibly leaks water during rainy seasons. The area is dusty because the streets are not tarred. All these, contend the Defendants, are contra indicated for the electric prosthesis.

[31] Ms Swart has stated that she has often found that the rate of rejection of an electric prosthesis is higher in single upper body limb amputees principally, in those who have had a break prior to rehabilitation such as the present case. She concluded that the Plaintiff is likely not to be an exception to what she has observed.

[32] The evidence of Professor Flemming, the orthopaedic surgeon, contained in his medico-legal report deserves a special attention. He could not attend court to justify his report. The complication that has arisen is that the Defendants have accepted his report in its entirety while the Plaintiff, the party that introduced it to court, is now reluctant that it be accepted as a whole.

[33] During the leading of evidence, both by the Plaintiff and the Defendants, it became clear that all the witnesses, without exception assumed, that Professor Flemming prescribed a mechanical prosthesis to the Plaintiff even though he did not expressly state so in his report. The truth is of course that it is completely not correct to suggest that what he describes in his report is the one or the other.

[34] Mr Grimsehl when giving evidence initially seemed to have acquiesced that the description of the prosthesis by Professor Flemming fitted that of a mechanical prosthesis. Later in his evidence, however, he took a different turn. Ms Nape too although her report is silent on what should be prescribed to the Plaintiff, co-authored a minute with her counterpart, Ms swart, the essence of which is that Professor Flemming recommended a mechanical prosthesis for the Plaintiff.

[35] When confronted with the fact that she signed a minute that describes the prosthesis as a mechanical one, she stated that she obtained the description on internet and that she did not really put much thought to it. All she did was simply to go along but then deferred to an orthotist for the ultimate prescription.

[36] Needless to state that this is in sharp contrast with Ms Swart who testified that she has always been convinced that Professor Flemming's account fitted a mechanical prosthesis. According to her, the deferment to an

orthotist was for the orthotist to add specifications on the mechanical prosthesis and not to prescribe.

[37] In so far as Mr Fourie is concerned, it transpired that he could not have recommended the electric prosthesis anyway because he lacked the necessary qualification at the time when he consulted with the Plaintiff and even during compilation of his report. Although he was by and large a credible witness, conceding when necessary, he remained without any option but to recommend a mechanical prosthesis.

[38] The only witnesses who expressed no doubt that the device described by Professor Flemming is a mechanical prosthesis are therefore Mr Fourie and Ms Swart both of whom gave evidence on behalf of the Defendants.

[39] The ideal under these circumstances would have been to call Professor Flemming as a witness to clarify what his description of the prosthesis means – does it refer to a mechanical or electric prosthesis? The court is left impoverish with knowledge of what Professor Flemming's description means. The *onus* of proving that the description fits that of a mechanical prosthesis on a balance of probabilities lies with the party alleging it. In this case the Defendants.

[40] Ms Swart and Mr Fourie specifically pointed to the cost and maintenance thereof and concluded that it was not the electric prosthesis. That being the case, it appears, they inferred that it is a mechanical

prosthesis. Other than as aforesaid there is no evidence that firmly supports the view that it is the one or the other.

[41] For that reason, the court will exclude that portion of Professor Flemming's report on the basis that it could not be adequately demonstrated what it is and besides, the court does not know what he is describing in his report.

[42] There being no dispute with the other aspects of Professor Flemming's report, for example, that the stub of the Plaintiff needs preparation before it can be fitted with any type of prosthesis. The court will accept the entire report except for the description of the prosthesis. Professor Flemming's recommendation of whatever he is describing in his report, it would seem, is unprejudiced in that either prosthesis can be fitted. An endeavour by both parties to tie him to the one or the other is totally gratuitous. Of course the scenario would have been unreservedly different had he been called to clarify this part of his report.

[43] All the witnesses are agreed that the prescription of the type of prosthesis is and should be a multi disciplinary team work. The team should preferably comprise an orthopaedic surgeon, occupational therapist, physiotherapist, a clinical psychologist and an orthotist. It is common cause that neither party called a psychologist and a physiotherapist to assist the court.

[44] The exclusion of the physiotherapist and the psychologist deprived the court of important information. This vital information would be appropriate, in the case of the psychologist, in assessing the feelings of the Plaintiff towards the use of either prosthesis. The physiotherapist would have played another fundamental role in advising the court what the impact of the use of either prosthesis would be on the Plaintiff's muscles.

[45] If one approaches this subject on the view that Professor Flemming was dispassionate when making his recommendation, then essentially he is saying that the Plaintiff can be fitted with either prosthesis without any problems.

[46] The orthotist, assisted by the other experts in particular, the occupational therapists, physiotherapists and psychologists would have been the one to decide on the prosthesis that is most suitable. The occupational therapist would examine whether or not he will accomplish his roles and function in that given environment with the particular prosthesis. Any effort by either occupational therapist to prescribe the type of prosthesis must be rejected. I have already indicated earlier that Mr Fourie could not have recommended an electric prosthesis because he was not qualified to do so when he consulted with the Plaintiff.

[47] The court must in the circumstances be prepared to make full exploitation of the facts at its disposal concerning the two prosthesis. When

doing so, the Plaintiff, his environmental surroundings and his daily life roles both at home and elsewhere, must always be at the hub. The court knows that the Plaintiff lives in Makititi, a somewhat remote area in Limpopo Province. Remote as it is, each dwelling unit is fitted with an electricity metre. However, the streets remain dusty and most of the dwelling houses and/or huts are built of mud bricks.

[48] The defendants assert that the Plaintiff will expose the electric prosthesis to dust when he does gardening especially when digging holes. The prosthesis is also likely to be exposed when he works on his thatch roof, which he said he will be required to do at least once per annum.

[49] Mr Grimsehl testified that one of the main objectives of rehabilitation of an amputee is to train him how and when to use the prosthesis. Mr De la Rey confirmed this and added that while training plays a significant part ultimately knowledge acquired through experience of the use of the prosthesis is equally indispensable.

[50] It is for this reason that Mr de la Rey found that an electric prosthesis is more suited to an office environment. Having said that, he did not rule out the possibility that one cannot utilise it for other things. In his case, for driving and carrying items that are not more than five Kilograms in weight. If the Plaintiff wants to carry a heavier object, he should be made aware during rehabilitation that he would have to fit in a griever.

[51] Mr De la Rey and all the experts testified that intuitively a single amputee will engage his natural arm to execute a duty. One would therefore imagine that the Plaintiff will not behave differently. One would for example anticipate that he would use his natural hand to chop wood or to dig wholes.

[52] In the case of Mr De la Rey one would think that since he is a double amputee, he would prefer to use his mechanical prosthesis if he has to do harder work. According to him, however, neither prosthesis is intended and should not be used for the chopping of wood or for doing more difficult gardening work such as digging holes.

[53] The contemporary electric prosthesis has a ceiling ring at the top to avert water and sweat from seeping into the prosthesis where the electronics are. It also has a PVC glove which protects it against dust. Thus, the Defendants' apprehension that a mere spillage of water on the prosthesis will result in malfunction is not well founded. The point is that a person with a Grade 10 level of education such as the Plaintiff can be advised of the do's and don'ts.

[54] With the necessary training, one would not expect the Plaintiff to soak the prosthesis in water, play or use it in wet conditions or expose it to excessive dust. If that were to happen, it must be an accident that could occur to any person whether living in an urban area or not.

[55] The prevalence of rejection of the prosthesis by single amputees on

account that it is heavy and feels like it is hanging at the end of the stub is not true of every amputee. Moreover, there is no psychologist evidence demonstrating what the Plaintiff's reaction is likely to be upon acquisition and use of the electric prosthesis. The testimony before this court is that naturally an amputee would want to stay without any appendages particularly when one is relaxed and in a private environment such as one's home.

[56] That the Plaintiff will lack means of servicing the prosthesis because he is a man of straw and that he lives far from centres that can service it does not hold water. There are centres in Gauteng province and possibly Polokwane, which is the nearest to his area. The evidence led showed that the Plaintiff, even before the accident, was in and out of Gauteng. I therefore foresee no obstacles in him bringing the prosthesis to be serviced when necessary. The Defendants' contention that the Plaintiff is far from Gauteng must be rejected.

[57] What has emerged so far is that both prosthesis cannot be utilised for heavy work. For that reason, it should not matter whether one prescribes the one or the other. Having said that, of the two however the electric prosthesis is cosmetically more acceptable and generally, one operates it more naturally than the other. The Plaintiff should therefore not be deprived of this sophisticated device that will make him feel confident and look socially acceptable.

[58] In so far as domestic assistance is concerned, I completely agree with the Defendant's Counsel that while Ms Nape has made certain

recommendations in that respect, her suggestions are made on the presumption that the Plaintiff will not obtain a prosthesis, electric or mechanical. The parties are arguing about the type of prosthesis that should be provided to the Plaintiff. The recommendation of Ms Swart is made with the Plaintiff having a prosthesis in mind. It follows that the proposition of Ms Swart is the more pragmatic and should for that reason be accepted.

[59] The Plaintiff should be trained and encouraged to engage his natural arm more than he does presently especially when he wants to do heavy physical work.

[60] There are other simple things that the Plaintiff will not be able to do despite having the prescription of either prosthesis. These comprise tying shoe laces, zipping trousers with stiff zips, etc. These are things that can easily be avoided by the Plaintiff especially because he knows that he has a disability. For example, it should make sense to him to purchase shoes that do not require shoe laces, avoid trousers with stiff zips, etc.

[61] I agree with the Plaintiff's Counsel that the fundamental rule underlying the award of damages in terms of *actio legis aquiliae* is that the compensation should be so assessed with a view to placing the injured party, as far as it is reasonably possible, in the position he would have been had the injury not occurred. See *Heil v Rankin and Another* 2000 (3) ALL ER.

[62] In the case of *Rens v MEC for Health Northern Cape Provincial Department of Health* 2010 (6D2) QOD (1 NCK) to which Plaintiff's Counsel referred this court. The MEC for Health in the Northern Cape was successfully

sued for damages flowing from negligent treatment. The treatment led to the amputation of the left arm of the plaintiff.

[63] The court accepted the orthotist's testimony that the plaintiff was well suited to be fitted with an electric prosthesis. The electric prosthesis was preferred in this case to a mechanical one because the evidence was that the latter causes unbearable discomfort to the extent that the prosthesis is usually later discarded by the amputee. The orthotist was able to demonstrate to the court how the plaintiff was able to move individual fingers, wrist and elbow of the prosthetic arm.

[64] The orthotics also testified that the plaintiff in the *Rens* case would require the primary prosthesis to be replaced every five years and a secondary prosthesis to be replaced every ten years. The secondary prosthesis could be used whilst the primary prosthesis undergoes refitting, maintenance and servicing. Such maintenance and servicing was to be carried out in Cape Town.

[65] The court was satisfied that Rens needed both prosthesis and found that it was reasonable to make provision for the immediate purchase of a prosthesis with the revolutionary new I-limb elbow which could be used as a primary prosthesis, while the existing one could be used as a secondary prosthesis until its replacement was needed. Thus the Defendants' assertion that the Plaintiff lives far from service centres cannot succeed. In the *Rens* case the plaintiff lived in the Northern Cape and the service and/or

maintenance centre was in Cape Town.

[66] A contrast of the one prosthesis against the other makes it inescapable to conclude that the electric prosthesis is closer to how the Plaintiff looked prior to the accident. This is not in terms of what he will be able to do as he will be limited in extent of functionality anyway.

[67] If the objective is to restore him as closely as is possible to his pre-accident position then the electric prosthesis is preferable. The evidence is that with the mechanical prosthesis, the Plaintiff will have to shrug his shoulder if he wants to open his hand to grasp an item. The shrugging is of course weird and odd especially when performed in public. With concentration, one can open and close the electric prosthesis with ease. The electric prosthesis is indubitably the better of the two.

[68] It is plain in this case that the argument between the parties is really about maximising or minimising the award depending on which side of the fence a party is. It is trite that in awarding damages, weight is given to a plaintiff's damages and not to what the defendant ought reasonably to pay.

[69 The Plaintiff has referred me to *Blyth v Van Heerden* 1980 (1) SA 191 where the appellant had made a provision for a claim of the cost of an electric arm in the event that he yielded to be amputated at the end. The experts of both parties in this case agreed that amputation and the subsequent fitting of

an electric prosthesis was the appropriate treatment. No regard was given to the external conditions such as in this matter.

[70] The seminal factor was the condition of the stump. In this case the court awarded the amount for the prosthesis albeit that it applied a contingency. The basis of such contingency was that although there was a likelihood, there were too many imponderables such as, whether or not the amputation would take place and if so, when.

[71] The Defendants seem to be totally swayed that the electric prosthesis should not be prescribed because according to Ms Swart, history has demonstrated that single amputee such as the Plaintiff and especially those that have lived without prosthesis for a number of years, (six years in the case of the Plaintiff), the rate of rejection increases. In this respect I entirely agree with the Counsel for the Plaintiff that damages are warded in accordance with what is legally due. It is completely beside the point whether or not the plaintiff is likely to utilise the award or use it for its intended purpose.

[72] In the premises I find that:

72.1 Once the orthopaedic surgeon, Professor Flemming in this case, had found that the Plaintiff would need surgical intervention whereafter he would be suitable to be fitted with either prosthesis, the orthotist, Mr Grimsehl, was entitled to choose an appropriate prosthesis for the Plaintiff;

72.2 Mr Fourie could not have said much about the electric prosthesis because even though he might have had knowledge of how the electric prosthesis worked he was not qualified as an expert at the time when he examined the Plaintiff;

72.3 The occupational therapists cannot prescribe the type of prosthesis that is appropriate for the Plaintiff. However, they can comment on the suitability of the prosthesis having regard to the Plaintiff's functionality, roles and the environment in which he lives once the orthotics has chosen the prosthesis;

72.4 The design of the electric prosthesis recommended by Mr Grimsehl is sufficient to withstand the limited environmental hostile conditions under which the Plaintiff lives;

72.5 The Plaintiff has established on a balance of probabilities that he reasonably requires the electric prosthesis to improve his condition.

[73] In the circumstances I make the following order:

1. The Defendants shall pay to the Plaintiff:

1.1 a globular amount of R650 000.00 being for general damages,

past loss of earnings and Future loss of earnings;

1.2 An amount of R39 648.00 for occupational therapy and orthopaedic treatment;

2. An amount that shall be the equivalent of the price of two electric prosthesis and the associated maintenance and service costs;

3. R90.00 multiplied by 10 hours being for domestic assistance as recommended by Ms Swart;

4. R3 710.00 being for various Assistive devices;

5. Interest at the rate of 15.5% on the aforesaid amounts reckoned from 14 days after the date of judgment;

6. Costs of suit.

B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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